

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Civil Case No. 45 of 2006

**BETWEEN: TERRENCE RODERICK HANNAM &
ETHEL CHAPMAN**
trading as
HANNAM AND CHAPMAN REAL ESTATE

Claimants

AND: JEAN YVES MAMELIN

Defendant

Hearing: 13 March 2012
Before: Justice RLB Spear
Appearances: Claimants: Juris Ozols
Defendant: Robert Sugden
Delivered: 22 June 2012

JUDGMENT

Copy to Mr John Malcolm for distribution to the Claimants

1. On 24 May 2004, Mr Mamelin appointed the Port Vila firm, *Hannam and Chapman Real Estate* as his agent to sell his 180 hectares farm at Narpow Point, Eratap near Port Vila. This claim is for real estate agent's commission in the sum of Vt 2.5 million.
2. Like many property transactions in Vanuatu, there is a complicated history to the relationship between the parties.
3. One of the defences initially raised was that the agency agreement (the contract between the parties) was unconscionable on the basis:-

“The defendant did not understand English, was not advised by the claimant that the Agreement had this effect, was not advised to obtain independent legal advice and was offered the inducement of an earth moving contract”
4. However, during the course of the trial, Mr Sugden formally abandoned that particular defence and no further attention needs to be given to it. Certainly, as I assess the evidence, that particular defence had no prospect of success.
5. Mr Mamelin denied liability to pay commission principally on the basis that *Hannam and Chapman* were not contractually entitled to the commission. Furthermore, even if Mr Manmelin became contractually liable to pay the commission, *Hannam and Chapman* should not be entitled to the commission because of their undisclosed and significant personal involvement in the purchase.
6. This case requires an understanding of the principal characters involved with this transaction.
7. Terrence Hannam was at that time in partnership in Port Vila with his mother Ethel Chapman and they traded as *Hannam and Chapman Real Estate*. Mr Hannam was also involved with property development.

8. Robert Herd was in Port Vila around 2004 and 2005. He is a lawyer from Brisbane, Australia who was in Vanuatu for that time working at the State Law Office. Mr Herd formed both a personal and a business relationship with Mr Hannam which, Mr Hannam explained, was generally in the nature of joint ventures for property development.
9. Mr Mamelin was the owner (the lessee) of the farm property previously described at Narpow Point. He also worked as builder.
10. The evidence for the claimant comes initially from these sworn statements:-
 - a) Two from Mr Hannam's mother, Ethel Chapman;
 - b) Two sworn statements from Mr Hannam in answer to written questions delivered; and
 - c) A very recent sworn statement by Mr Hannam of 12 March 2012. That last sworn statement requires some explanation.
11. Mr Hannam now resides in New Caledonia. He left Vanuatu a few years ago (probably around 2007-2008) although he apparently maintains certain business interests in Vanuatu. As Mr Hannam was living overseas when this case was being prepared, his business partner (Ethel Chapman) presented the evidence in support of the case essentially in her son's absence and also because it was not known at that time whether Mr Hannam would return to Vanuatu for this case if it came to a hearing. As it happened, Mrs Chapman now resides in Australia.
12. Mr Hannam, in his last sworn statement, has simply restated the evidence given by his mother. This was entirely appropriate particularly as he was principal of *Hannam and Chapman* who dealt directly with this particular transaction. No objection was taken to the late filing of the sworn statement of Mr Hannam who was made available for cross examination.
13. The evidence for the defendant was initially from these sworn statements:

- a) Three from Mr Mamelin;
 - b) Sylvie Cevourd (18 February 2010),
 - c) Rose Bangga (1 March 2011) and
 - d) Marie-Noelle Ferrieux Patterson (9 November 2011).
14. Only Mr Mamelin was required for cross examination.
15. Mrs Patterson is a lawyer in Port Vila and described herself as having been Mr Mamelin's lawyer since this case began. I mention this as it has some significance in respect of how the evidence is to be treated and I will return to that.
16. The farm property adjacent to Mr Mamelin's was owned by a company *3H Investments Ltd*. It was of a comparable size to Mr Mamelin's farm. Both that farm and Mr Mamelin's had significant ocean frontage and they were equally attractive propositions for development.
17. Mr Hannam was engaged by *3 H Investments* to find a purchaser for the 3H property. His efforts were successful and a sale was achieved in 2004. The purchase price was AUS \$400,000 which was (as the claimants assess) approximately Vt 32 million. The purchaser of that property was a company *Rentapau Holdings Ltd* and it is necessary for some explanation to be given about the people behind that company. That can best be described by a brief analysis of the annual returns for *Rentapau* for the years 2005, 2006, and 2007:-
- a) 2005 – Directors: Robert Herd and Terrence Hannam. Shareholders: Robert John Herd as Trustee of the *Montreal Trust* (1 share); and Robert John Herd as the trustee of the *Spada Trust*, (2 shares) - total of 3 shares.
 - b) 2006 – Sole Director: Robert John Herd. No change to the shareholding.

- c) 2007 – Sole Director: Robert John Herd. No change to the shareholding
18. *Rentapau* was a corporate vehicle formed by Mr Hannam and Mr Herd for their joint business activities. At the time, there was obviously a close relationship between them with Mr Hannam entrusting Mr Herd with the effective control of *Rentapau*. This control came about as the *Montreal Trust* was Mr Herd's family trust. The *Spada Trust* was Mr Hannam's family trust. Mr Herd was, however, until 2007, the sole trustee of the *Spada Trust* (Mr Hannam's trust) until the personal relationship broke down and Mr Hannam appointed himself sole trustee of the *Spada Trust* in place of Mr Herd. Mr Hannam ruefully acknowledged that he had placed too much control of his affairs in Mr Herd's hands but that is largely by-the-by.
19. Anyone searching the publicly available records for *Rentapau* would have found no mention of Mr Hannam except as a director in 2005. Mr Herd was essentially the public face of *Rentapau* but that belies the true ownership position which is that Mr Hannam's family trust was effectively the majority shareholder.
20. No further explanation is required about *Rentapau*.
21. Returning to the sale of Mr Mamelin's farm - Mr Hannam's evidence was that Mr Mamelin approached him in 2004, after the sale of the 3H property, he informed Mr Hannam that he had heard about the sale of the 3H property, and asked if Mr Hannam would handle the sale of his farm. All Mr Mamelin's dealings with *Hannam & Chapman* were with Mr Hannam. It can be noted also that Mr Mamelin is a native French speaker and Mr Hannam is also fluent in French. Mr Mamelin disputed that his dealings were with Mr Hannam during the course of his viva voce evidence. However, I do not accept his evidence in that respect as I will explain in due course.
22. Mr Hannam agreed to take on the agency for the sale of the farm and a written agency agreement was entered into on 24 May 2004. That agency agreement gave *Hannam & Chapman* the exclusive right, as real estate agent, to market Mr Mamelin's property for

sale over a 12 month term. Specifically, the agency agreement (such as it is) referred to, “*property title No. 12/1031/010 for the price of Vt 50 million (all commissions and charges included)*”.

23. The agency agreement dealt with the commission in this way:

“The commission charged by Hannam and Chapman real estate is 5% of the total sale price. The commission is paid for by the vendor on receipt of the Consent to Transfer from the Minister of Lands”.

24. *Hannam & Chapman* “found” a purchaser who is described in the agreement for sale and purpose entered into on 7 October 2004 as “*Robert Herd or nominee*” with the purchaser’s address specified as being “*C/- Hannam and Chapman Real Estate.....*”. Mr Herd subsequently nominated *Rentapau* as the purchaser.

25. The “*Land Sale Agreement*” (as it is described) was for a total consideration of Vt 50 million with the property described as the 180 hectare block of land contained in title 12/1031/010 and “improvements” of 300 cattle. The sale price was more exactly described as “*50,000,000 vatu, VAT inclusive*” with the following handwritten addition, “*CATTLE EQUAL 25,000 VT/HEAD ADJUSTMENT ON FINAL COUNT. 25 MILLION VT CATTLE AND CHATTLE (sic)*”

26. Mr Hannam stated in his evidence that Mr Mamelin wanted Vt 50 million for his farm inclusive of all the cattle.

27. There are a number of aspects to Mr Hannam’s description of the sale that are disputed by Mr Mamelin. In particular, he asserts that he did not approach Mr Hannam and in fact it was Mr Hannam who approached him to see whether Mr Mamelin was interested in selling his property. Furthermore, Mr Mamelin states that the Vt 50 million sum was more correctly the estimated value of the farm given by Mr Hannam and that he relied on Mr Hannam’s advice in that respect. He claimed that he was a quite

unsophisticated individual with no knowledge of business matters and that he trusted Mr Hannam. Furthermore, he claimed that he did not really understand the documentation that he signed as he does not read or write English and that he relied upon Mr Hannam who is fluent in both French and English.

28. It can be noted that this all occurred at a time when Vanuatu was experiencing something of a property boom with a number of coastal properties being bought for development particularly where the property was suitable for resort or luxury home development. The evidence was that, in 2004, it was still a rising market for this type of property. This could have been of some significance as Mr Mamelin refused to settle the sale of his farm to *Rentapau*.
29. *Rentapau* commenced civil proceedings in 2006 in this court seeking specific performance on the part of Mr Mamelin. In his evidence, Mr Mamelin asserts that he received an offer of Vt 200 million for his farm while the claim for specific performance was being pursued against him but he was not able to accept that offer because of the court proceedings. This, in a roundabout way, was raised as an indication of the loss of bargain sustained by Mr Mamelin. Of course, it is clear that a mere offer by itself cannot be taken as a reliable indication of the value of the property. As it happened, Mr Mamelin subsequently sold the farm for Vt 80 million in questionable circumstances but after there had been a cooling of the property market.
30. Mr Mamelin presented 3 sworn statements, all in English. However, his evidence in court under cross examination was remarkably different to that given in his sworn statements. Indeed, it was very difficult to appreciate that the Mr Mamelin who was cross examined by Mr Ozols could be the same Mr Mamelin who had given evidence by those 3 sworn statements. It should be noted here that Mr Mamelin was assisted throughout the hearing by an interpreter.
31. Mr Mamelin denied, in his viva voce evidence, that prior to the agency agreement for his farm being entered into between the parties, he was aware that the neighboring 3H

property had been sold for Vt 34 million or even that it had been sold. He denied in cross examination that he had ever approached Mr Hannam and stated that he never went to see Mr Hannam and never had any dealings with him. Furthermore, he denies ever having spoken to Mr Herd and said that he has never seen or spoken to Mr Herd.

32. Mr Mamelin was asked, “*who did you sell the property to?*” which was a question of some importance as Mr Hannam claims that Mr Herd was the eventual purchaser of the farm from Mr Mamelin for Vt 80 million through another entity, *Jive Holdings Ltd* . This happened at the same time that *Rentapau*’s specific performance proceeding was being discontinued by Mr Herd. Mr Herd had effective control at all material times of the claim by *Rentapau* for specific performance. Mr Hannam stated that he found out about the discontinuance and Mr Herd’s purchase through *Jive Holdings* after both events.
33. However, to that question “*who did you sell the property to?*” Mr Mamelin responded “*it was my lawyer who handled all the business about selling my farm. I don’t know who she spoke to and don’t want to know. My lawyer is Marie-Noelle Ferrieux*”.
34. He stated further that he could not remember how much the farm was sold for but thought that it was under AUS \$300,000.
35. I simply do not believe Mr Mamelin. I am in no doubt at all that he was closely involved in the sale of the farm both when Mr Hannam initially introduced Mr Herd as the nominal purchaser and when the farm was subsequently sold to *Jive Holdings*. Mr Mamelin did not impress me as someone who would leave all these important matters to his lawyer.
36. Mr Hannam’s evidence addressed a number of dealings that he stated that he had directly with Mr Mamelin. Indeed, in his sworn statements, Mr Mamelin said that he dealt with Mr Hannam on a number of occasions particularly with his repeated inquiries to Mr Hannam for confirmation that the deposit had been paid by Mr Herd. Yet, when

cross-examined, Mr Mamelin denied that he had dealt with Mr Hannam at all and said that his dealings were with Mrs Chapman.

37. The contradiction between Mr Mamelin's sworn statements and his evidence in Court is so remarkable that I can have no confidence in his credibility. I am unable to give any weight to any of his evidence.
38. It also needs to be mentioned that Mr Hannam came across as being clear and accurate in his recollection of the events and I certainly accept his evidence. This, despite the subterfuge in which he engaged with Mr Herd to purchase Mr Mamelin's property using *Rentapau* without disclosing his significant personal interest in that company.
39. Notwithstanding my assessment of Mr Hannam's credibility in relation to his evidence in this case, what is abundantly clear is that he had a significant financial interest in the contract for the purchase of Mr Mamelin's farm. His friend and business associate of the time (Mr Herd) nominated none other than *Rentapau* as the purchaser which company, of course, was essentially a property development vehicle employed by both Mr Herd and Mr Hannam through their respective family trusts.
40. A major complaint about Mr Hannam's involvement in the contract is that Mr Hannam never disclosed this significant personal interest to Mr Mamelin; and, without question, it should have been disclosed. It was not disclosed and the implications of that non-disclosure will be addressed later.
41. The first issue is whether the commission ever became payable as a matter of contract. The entitlement of the agent to the commission by the agency contract arose at the time that the consent for the transfer was obtained from the Minister of Lands. As it happened, that consent was forthcoming on 6 July 2005.
42. It is, of course, for the claimant (*Hannam & Chapman*) to prove on the balance of probabilities that it is entitled to recover the commission. To that end, Mr Ozols

pointed to the clear wording of the agency contract and submitted simply that *Hannam & Chapman* had done all that was required to earn its commission. That is, it had found a purchaser for the property for the price asked by Mr Mamelin and a contract was then entered into between Mr Mamelin and the purchaser (Mr Herd or nominee) for the sale and purchase of the property for the required price of Vt 50 million. Furthermore, the consent of the Minister of Lands to the sale and purchase of the property was received on 6 July 2005 at which time the commission was payable.

43. Mr Sugden argued that, if the agency contract was binding on Mr Mamelin, it did not entitle *Hannam & Chapman* to its commission unless *Hannam & Chapman* obtained a valid and binding sale agreement. He submitted that no valid and binding sale agreement was obtained as:

a) The deposit was not paid as required by the sale agreement;

b) The sale agreement was void for mutual mistake.

44. Mr Sugden also argued that it was implicit that the consent to the Minister of Lands had to be a valid consent and that no valid consent had been given obtained.

45. Mr Sugden's concluding submission was that, irrespective of the outcome of the above, if the Court was to find that the commission was payable as a matter of contract, the failure on the part of Mr Hannam to disclose his personal stake in the transaction must disentitle him to any commission for acting as the agent of Mr Mamelin.

46. I am in no doubt that, putting Mr Hannam's financial interest in Rentapau to one side for the moment, a valid and binding contract was entered into between Mr Mamelin and Mr Herd. Certainly, there is nothing on the face of the contract that makes the agreement between the parties (Mamelin and Herd) so uncertain that the contract could not be enforced. I accept Mr Hannam's evidence that a deposit was paid. I accept that the consent was given by the Minister. I do not accept that there is any basis for

considering that there was a mutual mistake. For reasons that I will soon come to, there is no need to elaborate on those findings.

47. The deposit was indeed paid in to court by Mr Hannam within the specific performance proceedings and pursuant to agreement reached between counsel for the parties; Mr Herd still acting for Rentapau. It was subsequently released to Mr Herd which is why it was not available to be applied by *Hannam and Chapman* to payment of the deposit.
48. I should mention that Mr Sugden argued that the contract required *Hannam & Chapman* to obtain for Mr Mamelin a sale just of the farm land at Vt 50 million. However, that is not what the agency contract requires besides the fact that it is against Mr Hannam's clear evidence which is largely supported in this respect by the agency contract. That evidence, which I accept, is that Mr Mamelin asked *Hannam & Chapman Real Estate* to obtain a purchaser willing to pay Vt 50 million for his farm inclusive of cattle. Mr Hannam acknowledged that the agency contract did not state that explicitly but he said that was what Mr Mamelin requested. Certainly, the agency contract itself does not conflict with Mr Hannam's evidence in that respect.
49. Accordingly, if the issue of Mr Hannam's personal interest in Rentapau is put to one side, I would find for *Hannam and Chapman*. However, this claim must fail because of the undisclosed personal stake in the contract by the agent.
50. While counsel did not provide any authority to me on this issue, it is well understood, and has been for many years, that an agent has a fiduciary duty to his principal and that he must not profit, or even stand to profit, from his involvement as agent except with the informed consent of the principal. This was put succinctly,

“Perhaps the clearest of the agent's fiduciary duties is that not to make a secret profit at his principal's expense.”

Bowstead and Reynolds on Agency (17th edit) para 6-041

51. Furthermore, where an agent is in serious breach of his duties as agent, the principal can refuse to pay commission in respect of the transaction as to which the agent is in breach;

Salomons v Pender (1865) 3 H & C 639

Andrews v Ramsay & Co [1903] 2 K. B. 635

52. The rationale for this is explained thus:

A breach of duty such as to justify refusal of remuneration may be described in various ways. In some cases, it may be sufficient to say that the commission has not been earned, without reference to discharge of the contract of agency, if any: this reasoning has been used where the agent has wrongfully delegated his duties or stated a wrong asking price for the property leading to its sale at less than the vendor intended. But in other cases it may be appropriate to say more generally that the agent's breach goes to the root of the contract or that his dereliction of duty is itself a repudiation of his obligations which may be accepted by the principal. Even a slight breach by the agent of the strict obligations arising from his fiduciary character, e.g. where the agent accepts a bribe, or himself purchases (without disclosure) his principal's property, is normally regarded as fatal and may be described as a breach going to the root of the contract, though in such cases it may sometimes also be said that an agent so acting is not acting as agent at all but as buyer, or generally not within the scope of his authority. In other cases, especially of professional agents, it may be said that he has been guilty of gross neglect or misconduct ..." (emphasis added)

Bowstead and Reynolds on Agency (17th edit) para 7-049

53. However it may be characterised from a legal perspective, it is clear in this case that *Hannam and Chapman* (essentially Mr Hannam) acted in clear breach of his duty to his principal (Mr Mamelin) by failing to disclose, certainly at the time of nomination, that *Rentapau* was a company in which he had a financial interest. Indeed, this was serious misconduct bordering on dishonesty given that *Rentapau* had obviously been set up in that way to conceal Mr Hannam's financial interest in it.

54. For these reasons, Mr Mamelin was entitled to refuse to pay the commission and *Hannam and Chapman* are not entitled to it.
55. Accordingly, I find against the Claimant.
56. The Defendant is entitled to costs on a standard basis either to be agreed or taxed.

BY THE COURT

A handwritten signature in black ink, appearing to read "R. J. [unclear]", written in a cursive style.